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No. 272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

T.F.H. PUBLICATIONS, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 22.6 of the Rules of the Supreme Court and in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, previously filed herein, petitioner respectfully directs the Court's attention to *RCA Corp. v. United States*, 80-2 U.S. Tax Cas. 85,055 (S.D.N.Y. 1980), a decision which was unpublished at the time petitioner filed its Petition for a Writ of Certiorari.

Among the questions presented by petitioner in its petition was: Did the respondent abuse his discretion by requiring petitioner to change its method of accounting from the accrual method authorized by Section 446(c)(2)

of the Internal Revenue Code to the cash method, where there was neither a finding that petitioner's method of accounting did not clearly reflect income nor a determination that respondent's changed method of accounting more clearly reflected income than the method used by petitioner.

RCA Corp., supra, holds without equivocation that respondent does not enjoy unbridled discretion to change petitioner's use of the accrual method of accounting authorized by I.R.C. Section 446 and that the ultimate question is whether a taxpayer's method of accounting clearly reflects income.

In *RCA Corp., supra,* the taxpayer received advance payments under television service contracts of various lengths. It used the accrual method of accounting and developed statistical schedules, based upon its experience, to justify the portion of the prepaid service contracts which were reported as income in each month.

As in the present case, the Commissioner argued in *RCA* that the decisions of the United States Supreme Court in *American Automobile Association v. United States,* 367 U.S. 687 and *Schlude v. Commissioner,* 372 U.S. 128 establish a principle of law that respondent ". . . may reject the use, for tax purposes, of *any* accounting method which defers until subsequent tax years the inclusion in gross income of payments received for services to be rendered at unspecified dates in the future" (emphasis supplied).

The United States District Court for the Southern District of New York rejected the Commissioner's position, stating:

> "Because we conclude that as a matter of law RCA was entitled to use a deferral method of accounting

> . . . so long as that method did 'clearly reflect income' . . . the method it used in 1958 and 1959 matched revenues and related expenses with such precision that it was beyond the Commissioner's discretion to conclude that the method did not 'clearly reflect income'" (at 85,064).

In the present case the Tax Court did not consider whether petitioner's method of accounting clearly reflected income despite uncontroverted evidence to that effect presented by petitioner. Nor did the Tax Court find the change in method of accounting urged by the respondent "more clearly reflected income" than that used by petitioner. Instead, the Tax Court has interpreted *American Automobile Association, supra,* and *Schlude, supra,* as establishing a principle of no deferral under any circumstances.

Had the Tax Court considered the issue of whether petitioner's method of accounting "clearly reflected income", it would have seen that it did. Income was being recognized as the expenses of producing such income were incurred, and such expenses were incurred at the rate specified in the Agreement of Sale. Therefore, income and expenses were precisely matched.

Inasmuch as *RCA Corp., supra,* arises in the Second Circuit, a potential exists for further conflict among the United States Circuit Courts of Appeals than previously noted by petitioner in pages 5-7 of its petition.

CONCLUSION

Petitioner therefore respectfully resubmits its prayer that its petition for writ of certiorari be granted.

Respectfully submitted,

By: /s/ Herbert M. Gannet
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Dated: September 12, 1980